

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 6, 2007

LORENZO DUPREE MARTHEL v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2005-A-407 J. Randall Wyatt, Jr., Judge

No. M2007-00459-CCA-R3-PC - Filed March 26, 2008

Petitioner, Lorenzo Dupree Marthel, appeals the post-conviction court's denial of his petition for post-conviction relief in which he alleged that his plea of guilty to the offense of second degree murder was not voluntarily and knowingly entered into, and that his trial counsel rendered ineffective assistance. After a thorough review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J. C. MCCLIN, JJ., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the appellant, Lorenzo Dupree Marthel.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Lisa Angela Naylor, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Petitioner was indicted on charges of first degree premeditated murder and first degree felony murder, each charge pertaining to the death of the same victim. Petitioner entered into a negotiated plea agreement in which he agreed to plead guilty to the lesser included offense of second degree murder with the State's recommendation to the trial court that Petitioner be sentenced as a Range I, standard offender, to twenty-five years. The State also agreed to dismiss the felony murder charge as charged in count two of the indictment.

At the plea submission hearing, the State offered the following factual basis for the plea:

[O]n March 16th, 2004, at approximately 2324 hours, at the home of Stanley Smythia and Shondra Dardes, at 4557 Brook Valley Drive, here in Davidson County, the victim in this case, Mr. Stanley Smythia, was home with Ms. Dardes' eleven-year-old son in the front room watching television. Ms. Dardes was in the back bedroom asleep with her other child. Mr. Smythia heard a knock on the door and went to open the door, when a masked man entered with a weapon drawn. He forced his way into the home and almost immediately he fired a shot, striking Mr. Smythia in the head. The suspect then demanded money and drugs.

He then went to the bedroom where Ms. Dardes had been awakened by the confrontation and the noise. He demanded money and drugs from her. She was able to pull out some money and contraband and gave it to him. He then fled the scene and went into the woods, which were directly behind the house, down a path.

The officers recovered a weapon, a pair of gloves, a ski mask and a dark colored sweatshirt along the path behind the home. They also took photographs and observed what appeared to be a Reebok's print of a [shoe] that was left. The officers noticed that it appeared to be one person had come through the cut, and only one person had gone out of the cut, based on the mud and the prints that were left.

Through a series of interviews and through the course of this investigation, a suspect by the name of Zo was developed. Initially, police believed that was Lorenzo Moore, who also went by the name of Zo and who had gold teeth. After further investigation and a series of interviews, they realized that – were drawn towards [Petitioner], who went by the nickname of Zo as well. One of the characteristics – and Ms. Dardes would be able to testify – is that the masked man was approximately six feet tall and did have gold teeth. That was one of the noticing factors.

And the proof would further show – the State would attempt to introduce a photograph of [Petitioner] when he was eighteen years old in which he did have gold teeth at that time.

After he was developed as a suspect, Detective Johnny Crumby approached him on August 7th, 2004. Following a *Miranda* rights waiver that was subsequently taped, [Petitioner] indicated – implicated himself in the shooting. He said he was there, and he was present. He said that he went with a friend of his and that his friend was the person that actually went inside the home and did the shooting. He did admit, throughout the course of that interview, that he wore Reebok shoes that night and dark colored clothing. He said he did drop a weapon through the cut of the woods and that he had run back to where the car had been waiting on the other side of the cut, which was on Brook Valley Drive.

At the guilty plea submission hearing, the trial court explained to Petitioner the elements of each charged offense, and that in the event he was convicted of both offenses, the offenses would merge, leaving him with one murder conviction for which he would be sentenced to life imprisonment. The trial court also explained the elements of the lesser included offense of second degree murder and the range of punishment for this offense. Petitioner indicated that he knew he was giving up his right to proceed to trial on the charged offenses, and that it was his voluntary decision to do so.

The trial court explained to Petitioner the constitutional rights he was waiving by entering a plea of guilty, and Petitioner said he understood the consequences of his plea. Petitioner acknowledged that he had reviewed the petition to enter a plea of guilty with his trial counsel, that trial counsel explained the ramifications of his plea, and that he understood the consequences of entering a plea of guilty. At the conclusion of the guilty plea submission hearing, the trial court accepted Petitioner's plea of guilty and sentenced him as a Range I, standard offender, to twenty-five years.

II. Post-Conviction Hearing

Petitioner, who was twenty-one years old at the time of the post-conviction hearing, testified that his trial counsel was appointed to represent him about six months after he was arrested on the charged offenses. Petitioner stated that he met with trial counsel approximately ten to fifteen times prior to the entry of his plea of guilty.

Petitioner said that he asked trial counsel to file a motion to suppress his statement to the police, but trial counsel told Petitioner "it wouldn't matter," because Petitioner had admitted that he was present at the crime scene. Petitioner maintained that he was under the influence of marijuana and cocaine at the time he gave his statement to the investigating officers. Petitioner stated that the interview occurred sometime between midnight and 1:00 a.m. Petitioner believed that trial counsel knew he was under the influence of drugs when he gave his statement, but he could not recall if he had specifically told trial counsel what drugs he had used. Petitioner said that he reviewed the videotape of his statement with trial counsel at the Justice Center. Petitioner asserted that it was apparent from the tape that he was under the influence of alcohol and drugs. When asked if the filing of a motion to suppress might have affected his decision to enter a plea of guilty, Petitioner responded, "Possibly."

Petitioner testified that he told trial counsel on several occasions that he wanted to proceed to trial. Petitioner believed that the only evidence connecting him to the crime was his statement to the police. Trial counsel told Petitioner that he did not think Petitioner should insist on a trial. Petitioner acknowledged that he was not under the influence of alcohol or drugs at the time of the guilty plea submission hearing and that he understood the trial court's explanation of his rights and the waiver of those rights.

Petitioner said that he did not know whether trial counsel had hired an investigator. Petitioner asked trial counsel to submit the gun found near the scene to fingerprint or DNA testing, but he did not believe that trial counsel took any action in this regard.

On cross-examination, Petitioner acknowledged that trial counsel met with him at the jail, and Petitioner telephoned him on several occasions. Petitioner conceded that he did not mention to trial counsel that he had used drugs before he gave his statement. Petitioner said that he was aware that a gun, gloves, and a mask had been found near the crime scene. Petitioner also acknowledged that the evidence showed only one set of footprints leaving the victim's house, and that Petitioner told the investigating officers that he was in the victim's house.

Trial counsel testified that he had been with the Public Defender's Office for ten years and had handled approximately one hundred felony cases. Trial counsel agreed that Petitioner's statement was problematic in the presentation of a defense. Trial counsel said that he reviewed the videotape of his statement with Petitioner and also Petitioner's family. Trial counsel hired an expert to review the videotape for the purpose of identifying any viable issues which could support a motion to suppress, but the expert was unable to do so. Trial counsel said that Petitioner answered the background questions appropriately, read his *Miranda* rights, and executed a written waiver of those rights. Trial counsel said that Petitioner told him he was tired during the interview but did not tell him he was under the influence of drugs.

Although he did not believe it would be successful, trial counsel said that he nonetheless filed a motion to suppress Petitioner's statement. Trial counsel's records indicated that a suppression hearing was not held prior to the entry of Petitioner's plea of guilty.

Trial counsel stated that Petitioner insisted that someone else was present that night, and that the other person was the shooter. Trial counsel said that the DNA sample recovered from the ski mask did not match Petitioner's DNA and thus lent support to their theory of defense. Trial counsel discussed the elements of first degree felony murder with Petitioner. Trial counsel and Petitioner had several discussions about the identity of the shooter. Petitioner initially identified Darrell Manley as the shooter and then said he did not know who the shooter was. Trial counsel said after that point, Petitioner was either unable or unwilling to name the second person he insisted was involved in the commission of the offense. The biggest obstacle, however, in trial counsel's view was the presence of only one set of footprints leading to and from the victim's house coupled with Petitioner's admission that he was present at the crime scene.

Trial counsel said that an investigator was assigned to the case, and trial counsel personally examined the crime scene. Information was developed that a neighbor of the victim's had video camera equipment placed around his house. Trial counsel said it was his recollection that the investigator talked to the neighbor and either the tape could not be located or the neighbor no longer had the tape. Trial counsel's records indicated that he filed a motion to compel. On redirect examination, trial counsel said that he and the prosecutor discussed the existence of the neighbor's videotape, and trial counsel was not aware whether anyone had been able to recover the tape.

III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-210(f). However, the trial court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to *de novo* review. *Id.*; *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In cases involving a guilty plea, the petitioner must show prejudice by demonstrating that, but for counsel's errors, he or she would not have pleaded guilty but would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 42, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

IV. Ineffective Assistance of Counsel

We note initially that in his post-conviction petition, as amended, Petitioner alleged as grounds in support of his ineffective assistance of counsel claim that trial counsel failed (1) to fully investigate the possibility that Petitioner was not the shooter; (2) to interview the individuals questioned by the investigating officers in connection with the case; (3) to request a hearing on Petitioner's motion to suppress prior to the entry of his plea of guilty; and (4) to request a photographic line-up.

On appeal, however, Petitioner argues for the first time that his trial counsel's assistance was ineffective because he failed to submit the weapon found at the crime scene for fingerprint testing and because he failed to review the investigator's notes. At the post-conviction hearing, trial counsel did not address the issue of whether any testing was or was not performed on the firearm. In addition, we observe that Petitioner's allegation concerning the failure to review the investigator's notes is taken out of context. Trial counsel was asked on cross-examination whether he had had the chance to look at the investigator's notes, and trial counsel conceded that he had not yet done so although he had an investigation file which contained a number of notes. Trial counsel specifically recollected that he had notes concerning the investigator's interview with one individual and a note concerning Petitioner's school records which were obtained by the investigator. Be that as it may, the post-conviction court did not make any findings on these issues. Issues raised for the first time on appeal are waived. *See Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004) (stating "an issue raised for the first time on appeal is waived") (citing *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996)).

As for the third allegation, trial counsel acknowledged that the investigator did not interview the various individuals questioned by the police officers during the investigation of the case. Trial counsel explained, however, that all of those questioned had denied any involvement in the commission of the offense, and he did not expect them to answer any differently had the investigator interviewed them.

The post-conviction court found:

[b]ased on the record and the evidence presented at the hearing, the Court is of the opinion that [trial counsel] represented the Petitioner in a competent and thorough manner. The Court is of the opinion that [trial counsel] made sound strategic decisions based on his extensive experience with cases of this kind. The Court does not find sufficient evidence to support the Petitioner's claims of ineffective assistance of counsel.

Based on our review of the record, we conclude that the evidence does not preponderate against the post-conviction court's finding that trial counsel's assistance was not deficient. Petitioner is not entitled to relief on this issue.

V. Guilty Plea

Petitioner argues that his guilty plea was not knowingly entered into because of trial counsel's failure to adequately investigate the facts surrounding his case. As a result of trial counsel's omissions, Petitioner contends that he was not fully informed as to the strength of the State's case at the time he entered his plea of guilty. Specifically, Petitioner submits that he was not aware that his trial counsel had hired an investigator or that his trial counsel had filed a motion to suppress. Petitioner also points to trial counsel's failure to submit the murder weapon for testing,

to review the investigator's notes, and to interview those individuals questioned by the police in connection with the case.

When an accused enters a plea of guilty, constitutional considerations mandate that the plea be voluntarily, understandingly and knowingly entered. See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1713, 23 L. Ed. 2d 274, 279 (1969); *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1997). By entering a plea, the defendant waives certain constitutional rights including the privilege against self-incrimination, the right to a trial by jury, and the right to confront witnesses. *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1714. The defendant's waiver of these constitutional rights may not be presumed from a silent record. *Id.* A plea cannot be voluntary if the accused is "incompetent or otherwise not in control of his mental facilities" at the time the plea is entered. *Blankenship v. State*, 858 S.W.2d 897, 904-05 (Tenn. 1993) (quoting *Brown v. Perini*, 718 F. 2d 784, 788 (6th Cir. 1983)). The trial court must ascertain if the defendant fully understands the significant consequences of his or her plea. *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1977). The trial court may consider a number of factors including the defendant's relative intelligence, his or her familiarity with criminal proceedings, whether the defendant was represented by competent counsel and had the opportunity to confer with counsel about options, the advice give by counsel and the trial court about the charges against the defendant and the penalty to be imposed, and the defendant's reasons for pleading guilty. *Blakenship*, 858 S.W.2d at 904.

Trial counsel testified that he met with Petitioner on several occasions and reviewed the State's evidence, the charges against him, and the possible punishment. Trial counsel hired an expert to evaluate whether an issue as to Petitioner's possible incapacitation during his statement could be raised. Despite the disappointing results of the evaluation, trial counsel filed a motion to suppress even though trial counsel did not believe that Petitioner would prevail on the motion. Trial counsel testified that he thoroughly discussed with Petitioner a defense based on an alternate suspect, but Petitioner was unable or unwilling to name the shooter. Trial counsel explained to Petitioner that even were they successful in identifying another individual as the possible shooter, Petitioner could still be found guilty of the charged offenses under a theory of criminal responsibility. The post-conviction court implicitly accredited trial counsel's testimony and found:

that the Petitioner was represented by an experienced, competent attorney, who adequately explained the criminal proceedings the Petitioner was facing and the possible alternatives. The Court finds that the Petitioner was fully apprised of the charges against him, and the penalty the charges carried. After considering the testimony as well as the transcript of the plea proceedings, the Court cannot find any merit to the Petitioner's contention that the guilty plea was not entered into voluntarily. The Court is therefore of the opinion that Petitioner's plea of guilty was a voluntary and intelligent choice among the alternatives, and was entered into knowingly, voluntarily, and intelligently.

Based on our review of the record, we conclude that the evidence does not preponderate against the post-conviction court's finding that Petitioner's plea of guilty was entered into voluntarily, understandingly, and knowingly. Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE